

BEFORE THE TENNESSEE DEPARTMENT OF EDUCATION

IN RE:

D. and J. H. on behalf
of their son, J. D. H.,

Petitioners,

v.

HAMILTON COUNTY SCHOOL
SYSTEM,

Respondent.

No. 04-31

ORDER

Patty K. Wheeler
Administrative Law Judge
P.O. Box 2231
Knoxville, TN 37901-2231

Attorney for School District

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Parents

D. & J. H., pro se
XXXXXXXXXX
Ooltewah, TN 37363

[To protect the confidentiality of the minor Student, J. D. H. will be referred to as "Student or JDH" on all remaining pages of this decision and Students' Parents will be referred to as "Parents or Mr. or Ms. H."]

Introduction:

A Due Process Hearing was requested by the parents on behalf of their 18 year old son, J.D.H. The request was received by the Division of Special Education, Tennessee Department of Education on April 21, 2004. The Department appointed this Administrative Law Judge to hear the case on April 22, 2004. The 45-day rule was waived by Agreement of the parties on a May 14, 2004 conference call. A Pre-Conference Letter of Agreement was issued on May 18, 2004.

The Hearing was held at the offices of Gary D. Lander, Attorney for the Hamilton County School District, located at 2 Union Square, 1000 Tallan Building, Chattanooga, Tennessee 37402 on June 22 and 23, 2004. At the close of the Hearing, parents and counsel for Hamilton County School District agreed to submit Post-Hearing Briefs on or before Monday, August 9, 2004. The Briefs were timely filed by both parties.

Procedural History:

The parents initiated the request for the Due Process Hearing pursuant to the Individuals with Disabilities Education Act, 34 C.F.R. §300.403: Children with Disabilities enrolled by their parents in private schools when F.A.P.E. is at issue.

The parents disagreed with the Individual Educational Plans proposed by the Hamilton County School District.

The parents set forth in a clarification of the statement of issues the following issues to be addressed at the Due Process Hearing.

1. Request retroactive reimbursement for tuition and transportation for the calendar year 1998/1999 for placement of J.D.H. at the Scenic Land School.
2. Request for retroactive reimbursement for tuition and transportation for the calendar years 2001/2002 for placement of J.D.H. at Scenic Land School and 2003/2004 for

placement of J.D.H. at Berean Academy.

3. Request for placement as well as tuition and transportation costs for the year 2004/2005 for placement of J.D.H. at Berean Academy.

Witnesses:

The claimants, parents, presented testimony from five (5) witnesses. They were as follows:

Dr. Max Vincent Bryant, M.D., - J.D.H.'s Pediatrician from age 8 or 9 months to the present. JDH is now 18 years of age.

J.D.H. - 18 year old who testified on his own behalf. He was also added as a named claimant for the Due Process Hearing procedure.

Donna Scott, teacher at Scenic Land School since 1997 to the present. B.S. degree in Science and Health and Physical Education. Tennessee Teacher's Certification in the fields of Biology and Health and Physical Education in the regular classroom.

Mary Ellen Brown - former teacher at Scenic Land School and presently in charge of IEP's and assessment, Scenic Land School. B.A. in History from Wells College, Master's Degree in Education at the University of Tennessee at Chattanooga. Tennessee Teachers Certification Special Education, Kindergarten through 12th grade.

Eileen Card, Headmaster at Scenic Land School. Employed there for 11 years, previously principal of middle school at Scenic Land School. Tennessee Teacher's Certification in Art and Special Education, Kindergarten through 12th grade.

The school system presented testimony by two (2) witnesses. They were:

Margaret S. Abernathy, Exceptional Education Teacher and Department Chair for 30 years for Hamilton County School District at Ooltewah High School. B.S. Music Education, University of Tennessee and University of Tennessee at Chattanooga and Masters of Education Exceptional Education, University of Tennessee, Chattanooga. Tennessee's Teacher's Certification in Vocal Music, Kindergarten through 12th grade and certification in Global Special Education, Kindergarten through 12th grade.

Pamela A. Hudson - Director of Exceptional Education at Hamilton County Department of Education School District. B.S. degree Elementary and Special Education, University of Tennessee at Chattanooga. Master of Education degree in Administration and Supervision at the University of Tennessee at Chattanooga and 30 Post Master's Semester Credit Hours of course work in Special Education and Educational Leadership, University of Tennessee, Knoxville and University of Tennessee at Chattanooga.

Witnesses - All witnesses were found to be credible. The extent of each witness' training, experience and expertise as well as the direct experience each had had with J.D.H. were primary elements considered in determining the weight given to each individual's testimony and to the recommendations each made.

Findings of Fact:

Medical and Psychological History:

Dr. Max Bryant has been J.D.H.'s Pediatrician since J.D.H. was 8 or 9 months of age. (Bryant Tr. p. 10). Dr. Bryant explained that initially the greatest concern was about J.D.H.'s respiratory status since he had a number of respiratory problems and asthma. (Bryant Tr. p. 10).

J.D.H. developed motor skills as expected. When he was approximately 2 years old, Dr. Bryant noted that J.D.H. was not responding to his environment and to individuals in his environment as he felt he should. J.D.H. developed language skills but did not communicate or relate to others. Dr. Bryant referred J.D.H. for further evaluation. (Bryant Tr. p. 11). J.D.H. was seen by a neurologist and diagnosed as a "child with a pervasive developmental disorder", a broad overview term for a wide range of disorders. (Bryant Tr. p. 12).

When J.D.H. was approximately 4 years of age, 1990, Dr. Bryant diagnosed him as a child with Attention Deficit Disorder (ADD) (Bryant Tr. p. 28). Since J.D.H. had difficulty focusing on tasks, Dr. Bryant prescribed Ritalin, Tofranil and Cyclert. (Bryant Tr. pp. 29-30). Tofranil was used as an anti-anxiety agent. (Bryant Tr. p. 31). Cyclert was at that time prescribed to treat Attention Deficit Disorders but is no longer used due to side effects such as cardiac arrhythmias. (Bryant Tr. p. 32).

Dr. Bryant referred J.D.H. to Dr. William E. McGee, Ed. D. in 1997 for a further

psychological consultation. (Bryant Tr. p. 33). Dr. McGee's impressions were that J.D.H. had (1) moderate to severe Attention Deficit Hyperactive Disability (ADHD) and (2) Generalized Anxiety Disorder, moderate to severe in acute phase and with obsessive characteristics (Exhibit 3).

Late in 1995 and throughout 1996, J.D.H. had a series of months of ongoing weight loss and abdominal complaints. Dr. Bryant described J.D.H. as being "anorexic" and referred him for gastroenterological evaluations by Dr. Drago Tolsa and Dr. Robert Marshall. (Bryant Tr. pp. 40 - 41). Dr. Tolsa ruled out any anatomical abnormality as the cause of J.D.H.'s weight loss. Dr. Bryant took J.D.H. off Ritalin to see whether that was a possible cause of the weight loss and found that it had no effect. (Bryant Tr. pp. 47 - 49). In February, 1997, Dr. Bryant placed J.D.H. on Ritalin again. At that time it was the only medication J.D.H. was taking. (Bryant Tr. pp. 52). Dr. Bryant opined that the period of weight loss was primarily due to J.D.H.'s anxiety due to his school experience at Snow Hill Elementary School. J.D.H. was also seen for Pediatric Neurological Evaluation and treatment by Dr. Chris Miller who initially saw J.D.H. in August, 1997 for assessment of possible epilepsy, which was ruled out. Dr. Miller continued to see J.D.H. as he matured and also worked with Dr. Bryant on J.D.H.'s care. (Exhibits 8 & 9).

In July, 1999 Dr. William F. McGee, the Pediatric Psychologist, evaluated J.D.H. at the request of the Hamilton County School District and the parents who were involved in mediation regarding the most appropriate educational placement for J.D.H. (Bryant Tr. p. 59). Dr. McGee's diagnostic impression based on the D.S.M. IV was that J.D.H. had Asperger's Disorder. (Exhibit 5).

Dr. McGee noted in his report the following:

"(J.D.H.) is very fragile emotionally. Historically, whenever he has been frustrated in a school environment he has begun to deteriorate emotionally. He has experienced and continues to experience significant bouts of anxiety and he has undergone a

period of anorexia. His thinking is concrete and obsessive....(J.D.H.) requires a learning environment in which he sees himself as competent and productive and in which he is competent and productive. (Exhibit 5).

Dr. McGee's report contained a number of recommendations which emphasized a need for J.D.H. to be in a predictable, safe environment away from bullying and teasing and with few transitions during the day and with a consistent daily routine. (Exhibit 5). Dr. McGee also noted that children with Asperger's Disorder are often distracted by internal stimuli and have difficulty sustaining focus on classroom activities. They tend to withdraw into complex inner-worlds in a manner much more intense than is typical of daydreaming and have difficulty learning in a group situation. He noted that children with Asperger's Syndrome have the intelligence to compete in regular education but they often do not have the emotional resources to cope with the demands of the classroom. They're easily stressed. Interacting with people and coping with the ordinary demands of every day life take continual herculean effort. These children need to have the emotional distress reduced by offering a high level of consistency. Dr. McGee recommended that:

“(J.D.H.) must receive academic assistance as soon as difficulties in a particular area are noted. Children with Asperger's Disorder are quickly overwhelmed and react much more severely to failure than do other children.” (Exhibit 5).

J.D.H. was again seen by Dr. McGee in December, 2001. At that point J.D.H. was 15 years 3 months of age and had been attending Scenic Land School since 1998. Dr. McGee noted “since enrolling in Scenic Land School, (J.D.H.) has become fairly active in the Student Government, and has made some friends. His level of anxiety has reduced significantly, though he is easily upset by immediate or unanticipated changes in routine. The recent decision by Scenic Land School to discontinue the upper school has been quite disturbing to (J.D.H.).” (Exhibit 6)

Dr. McGee was asked to see J.D.H. by the Assessment Team to obtain a measure of

cognitive skills and overall intellectual functioning ability using a non-verbal test. Dr. McGee administered a number of tests and from that made several observations and recommendations. His diagnostic impression was that J.D.H. had Asperger's Disorder with associated features including obsessive/compulsive behavior, generalized anxiety, and Attention Deficit Disorder.

Dr. McGee again noted "(J.D.H.) is an emotionally-fragile adolescent. He reacts poorly and with great anxiety to real, immediate and unanticipated changes in his life." (Exhibit 6)

Dr. McGee emphasized that J.D.H. would be easily overwhelmed by extraneous sensory stimuli. Examples of such overloading included some of the following:

"Sudden or significant movement in his environment, significant background noise as in a high school hallway or cafeteria, new smells and tastes, vibrations in the flooring, sudden interruptions of an intercom." (Exhibit 6)

Dr. McGee stated "(J.D.H.)'s school needs include an environment with structure and predictability, and with minimized extraneous stimuli. If he is to change schools he might best make the adjustment incrementally rather than all at once." Dr. McGee explained that since J.D.H. was sensitive to environmental stressors, "He will be anxious and will tend to worry excessively when he does not know what to expect. He can be upset easily by stress, fatigue, and sensory overload". Dr. McGee emphasized that the educational environment should:

- Make environment predictable and safe
- Minimize transitions
- Be consistent with daily routine
- Prepare J.D.H. well in advance for special activities or changes in routine, possibly by talking briefly about the change for 5 to 10 days in advance of the actual change where possible.
- Protect J.D.H. from bullying and teasing

- Teach J.D.H. what to say and how to say it to improve social interactional skills
- Model 2 way interactions and let him role play.
- Provide regimented and externalized structure in the classroom
- When assigning timed units of work, make sure J.D.H.'s slower writing speed is taken into account.

Dr. McGee pointed out that J.D.H. is "very literal and his thinking is concrete.... J.D.H. has limited emotional resources to cope with many classroom/school demands." (Exhibit 6).

Both Dr. McGee and Dr. Bryant pointed that J.D.H. has a good memory which can be both a help and a hindrance. Dr. Bryant shared his observations of J.D.H. and trauma. He stated:

"With traumatic experiences, with scary things, something that he fixes on as far as there being disturbances in the school situation, other children reacting to him adversely, (J.D.H.) fixates on this and tends to replay that over and over in his mind, and is difficult for him to extinguish that problem that he has with the environment or the scary experience or disturbing experience whatever, it happens to be and it tends to....he tends to dwell on it and obsess with it." (Bryant Tr. p. 19).

Dr. Bryant has followed and treated J.D.H. since he was a few months old. He has spent a great deal of time with J.D.H. Dr. Bryant was asked what type of school J.D.H. should attend, a large public school or a small private school. He replied:

"Well, J.D.H. would not and cannot stand the stress, the anxiety, of being in a large, crowded school situation where other children may not appreciate his uniqueness. And, very often, children in this situation are picked upon because of their unusual characteristic behaviors, and that would cause a great deal of anxiety in J.D.H." (Bryant Tr. p. 23)

Dr. Bryant further testified at the June, 2004 Hearing:

“Well, I’ve spent many, many hours talking to (J.D.H.) as a physician....(J.D.H.) does not have what we would consider a normal thought process, as far as being able to reason through things. He has what we have finally come to recognize as Asperger’s Syndrome, which is a part of the Autism Spectrum Disorder.... and that disorder has a lot of social anxiety. **Anxiety is one of the biggest concerns that I have about J.D.H. and one of the things that affects him the most.**” (Bryant Tr. pp. 14-15) (Emphasis Added).

J.D.H.’s anxiety was reduced when he attended a smaller school environment at Scenic Land School. J.D.H. responded “wonderfully.” Dr. Bryant noted that J.D.H. in fact excelled in some things in the Scenic Land School environment. He improved in academics, socialization, and relationship to other people. (Bryant Tr. p. 15). Dr. Bryant opined that Scenic Land School, a small caring environment, was the appropriate placement for J.D.H. (Bryant Tr. pp. 21-22: Exhibit 1).

Developmental Social and Education History:

J.D.H. is an 18 year old student, birth date 3/19/86, who, by virtue of where he lives, is zoned for Hamilton County School District (HCSD) (Exhibits 5-9). J.D.H. lives with his parents and younger brother and sister. His siblings have no known learning or medical problems. Both siblings attend regular classes at Ooletwah High School. (J.D.H. Tr. p. 114). J.D.H. will be entering the 12th grade in the fall of 2004. (J.D.H. Tr. p. 121). J.D.H. was diagnosed with Asperger’s Syndrome in 1999 by Dr. William McGee. (Exhibit 5).

Although J.D.H. developed motor skills generally as expected, he did not attain developmental milestones as expected in speech and language. At 2 ½ years of age J.D.H. began speech and language therapy. (Bryant Tr. p. 11).

At approximately 4 years of age, J.D.H. began pre-kindergarten at Westview Elementary School in a class for language impaired. He was later phased into a regular kindergarten class with

Special Ed and Speech and Language Therapy Services. (Exhibit 30). After kindergarten J.D.H. attended Snow Hill Elementary School, his home-zoned school, where he was placed in a regular classroom with Special Ed Support Services and Speech and Language Therapy. In the 4th grade at Snow Hill Elementary, he was placed in an Inclusion Program with AAC and continued Speech and Language Therapy. He attended the 5th grade at Snow Hill Elementary and continued in the Inclusion Program with Speech and Language Therapy Services. (Exhibit 30).

During J.D.H.'s 5th grade year at Snow Hill Elementary he began to experience difficulties. His grades fell, he experienced health problems and great anxiety about school. (J.D.H. Tr. pp. 94-95; Exhibit 13). During the 5th grade year, J.D.H. described himself as feeling very sad and depressed at that time and even had thoughts that it was not worth living. When asked to describe his anxiety he said "It was just – it was like a weight on you. It just bothers you half to death." (J.D.H. Tr. pp. 95-96).

In his testimony, J.D.H. explained the difference between Scenic Land School and Snow Hill Elementary as follows:

"The difference is Snow Hill was just too crowded. It was just hard on me. I had a lot of bad memories, a lot of things, bad things, that keep popping in my mind. And Scenic Land, I have a lot of good memories, happy times. It was better at Scenic Land than it was at Snow Hill." (J.D.H. Tr. p. 98)

J.D.H. thrived at Scenic Land School. His grades improved and he made a friend for the first time. (J.D.H. Tr. p. 98; Card Tr. p. 268). When Scenic Land School closed its high school, J.D.H. was very upset. He stated he began to have bad memories of Snow Hill Elementary play through his mind. (J.D.H. Tr. pp. 101-103; 105; Card Tr. p. 259). He feared he would have to return to the public school system where he had been so unhappy. (J.D.H. Tr. p. 102).

J.D.H.'s parents searched for another school for J.D.H. They found Berean Academy. J.D.H. was placed in regular education with modifications and small classes. (Card Tr. p. 306). Berean Academy was described by Eileen Card as similar to Scenic Land in its environment. "It is a small school with small class size. It has more of an elementary school feel to it." (Tr. 267).

Ms. Card further explained that she observed that at Berean Academy there is not a lot of changing from one end of the building to the other, which often confuses children with Asperger's. She noted it is important to make their day as calm and structured and routine as possible and as quiet as possible. (Tr. p. 268). Ms. Card saw J.D.H. at SLS almost daily over the 3 year period he attended. (Card Tr. p. 288). She testified that a regular classroom would "be out of the question" but program accommodations, with extra time to work and extra explanations and assistance would allow J.D.H. to be very successful and graduate. (Card Tr. pp. 274-275)

J.D.H. was enrolled in Berean Academy at the beginning of his 10th grade year in 2002. (Bryant Tr. p. 50). At Berean Academy J.D.H. did well in the small class size of 9 to 10 with additional tutoring and modifications in his school work. (J.D.H. Tr. p. 109). J.D.H. described himself as happy and experiencing ongoing success at Berean Academy. (J.D.H. Tr. p. 111).

J.D.H.'s Testimony:

J.D.H. attended the first day of the Due Process Hearing and testified. J.D.H. was very sincere and honest in his testimony. J.D.H. contrasted his public school experience with that of Scenic Land as set forth above.

J.D.H. prospered at Scenic Land. He made a friend for the first time. (J.D.H. Tr. pp. 98-99). J.D.H. also for the first time received recognition and achievement awards which served to improve his self-esteem (J.D.H. Tr. 101) and he participated in a school play. (J.D.H. Tr. 112).

It was clear from J.D.H.'s testimony that he was aware of his personal needs for an adequate learning environment.

Q. Can you tell us what you believe, with all your heart, has made you to be a successful person.

A. It's just – since I'm in the right environment, it's just – that's what has made me successful.

(Tr. pp. 113-114).

Issue 1: Tuition Reimbursement Issue 1998 - 1999/Statute of Limitations:

Hamilton County School District's Attorney made an Oral Motion to Dismiss claimants' claim for reimbursement for the 1998-1999 school year at the beginning of Hamilton County School District's Proof in this case on June 23, 2004. The Motion was taken under advisement and Hamilton County School District moved forward to present its proof following a response to the Motion by the Petitioner. On consideration of Respondent's Motion to Dismiss, the response by the Petitioner, exhibits and the record as a whole, the following has been found.

Issues:

Is Petitioner's request for tuition reimbursement for the school year 1998 - 1999 barred by the statute of limitations?

Answer: The request is barred by the Statute of Limitations.

Factual History:

J.D.H., an 18-year old student, has been zoned for the Hamilton County School District since he began school in 1990. (Exhibit 30). IEP meetings were held throughout the 1998 and 1999 school years to address J.D.H.'s educational needs. (Exhibits 31, 32, 37, 38, & 39). During the January 29, 1999 IEP meeting, the parents disagreed with the recommended placement for J.D.H. in

the Hunter Middle School AAC class. (Hudson Tr. p. 532) (Exhibit 38). The parents were supported in their disagreement by the Inclusion Teacher, Bobby Cross, Jr., who had taught J.D.H. in the Inclusion Program at Snow Hill Elementary. (Exhibit 38). Following the January 29, 1999 IEP meeting, the parents filed a Minority Report with the Hamilton County Department of Education requesting that J.D.H. remain at Scenic Land School at the counties' expense. (Exhibit 40). Bobby Cross, Jr., the Inclusion Teacher at Snow Hill Elementary School, also filed a Minority Report indicating that J.D.H. was functioning at a level intellectually above those of others in the AAC Program. He suggested that J.D.H. was capable of functioning in a regular program with inclusion assistance throughout the day. (Exhibit 41). Ultimately, J.D.H. was unilaterally placed by the parents at a private placement, Scenic Land School. (Exhibit 29).

The parents were informed both verbally and in writing of their rights concerning the education of their child on a number of occasions. The parents' rights booklet was presented and explained to either one or both parents on several occasions. The M-Team notes indicate that the parents' rights booklet was presented and explained to the parents of J.D.H. on November 23, 1998. It is apparent from the statements in the M-Team summary notes that the parents had previously been given that information. Mrs. H. said that she had read and had several copies of the booklet. She had no questions concerning the parental rights or rights for education for her child. (Exhibit 37). The M-Team summary notes of January 29, 1999 indicated that the parents were given a booklet explaining parental rights and that they indicated that they understood their rights. (Exhibit 38). The M-Team summary of April 30, 1999 again indicated that the parents were given the booklet explaining parental rights and also were additionally given a Due Process Form to request a Due Process Hearing.

On May 6, 1999, Joe Fisher from the Tennessee State Department of Education responded to the issues stated in the Minority Report filed by the parents on January 28, 1999. A primary finding of the investigation was that the IEP-team members believed that the private school placement was too restrictive and would not agree to reimburse the complainants for tuition for 1998-1999. In his response, Mr. Fisher informed the parents that the issues must be addressed by the IEP team and that if the parents disagreed with the student's IEP or with the decision about reimbursement of private school tuition, then the parents should pursue other avenues of resolution such as mediation and/or a Due Process Hearing. (Exhibit 43). On May 7, 1999, a Special Education Mediation Request was filed on behalf of J.D.H. by his parents. A summary of the issues to be mediated indicated "issues with placement and related services." (Exhibit 46).

Mediation was conducted on June 25, 1999 by Laura Miner, Mediator for the Tennessee Department of Education, to discuss the Individualized Educational Program for J.D.H., the Hamilton County Board of Education and the parents. There were several points of agreement but the major issue of agreement was that an independent comprehensive evaluation would be completed by Dr. William McGee, a pediatric psychologist. The purpose of the clinical evaluation was to assist the Team to determine whether J.D.H. should and would be able to re-enter the public school system at that time. It was agreed that an IEP Team meeting would be called at the conclusion of the assessment to determine if any additional educational disabilities were found, review recommendations for educational programming to include the need for Special Education and/or related services, and to then determine educational placement for the 1999/2000 school year. The mediator, Ms. Miner was to return to assist the Team at the conclusion of the assessments. (Exhibit 47). Ms. Miner did not return to assist the Team at the conclusion of the assessment as planned. Dr.

McGee evaluated J.D.H. on July 13 through 22, 1999 to determine the school environment that he would recommend for J.D.H. Ultimately for the 1998-1999 school year J.D.H. was unilaterally placed in Scenic Land school by his parents for which the parents now request reimbursement. (Exhibit 5).

Conclusions of Law:

The IDEA does not specify a particular statute of limitations, the Court in Janzen v. Knox County Board of Education, 790 F. 2d 484 (6th Cir. 1986), held that no single state statute limitations applied to each IDEA action. Rather, the cases are to be analyzed on a case by case basis to choose the most analogous state statute of limitations.

The Janzen Court applied a Tennessee three year statute of limitations, as opposed to the 60-day statute of limitations in the Uniform Administrative Procedures Act, T.C.A. §4-5-322 (1998), to an original action filed in federal court seeking reimbursement for private school tuition.

J.D.H.'s parents did not request a due process hearing until April 2004, therefore the claimants' request for reimbursement for the school year 1998-1999 is barred by the 3 year statute of limitations. T.C.A. §28-3-105(3).

Issue 2: Request for retroactive reimbursement for tuition and transportation for the calendar year 2002/2003 and 2003/2004 for placement of J.D.H. at Berean Academy.

Findings of Facts:

J.D.H. attended Scenic Land School (SLS) in 1999/2000; 2001/2002. Hamilton County Schools (HCS) paid for is 2001/2002 education. (Hudson Tr. p. 543). The IEP developed April, 1999 was implemented at SLS. The April 1999 IEP was developed according to HCS policies and procedures and Ms. Hudson served as the contact from HCS to SLS. (Hudson Tr. p. 546).

Ms. Hudson testified that J.D.H.'s parents consistently expressed a preference for J.D.H. to remain in the small private school setting at SLS. (Hudson Tr. p. 547). Ms. Hudson further testified that each year the parents of J.D.H. were offered the opportunity to return J.D.H. to public school and each year the parents declined the offer (Hudson Tr. p. 548).

J.D.H. was not being harmed by remaining in SLS. He was making progress there both socially and educationally. (Hudson Tr. pp. 565-566). On October 5, 2001 an IEP was developed for the school year 2001/2002 to be implemented at SLS under a contract with HCS. (Hudson p. 576, Exhibit 50). The 2001/2002 school year is not at issue.

2002 IEP for school year 2002/2003

On March 2, 2002 an IEP team meeting was held at SLS. (Hudson Tr. p. 587, Exhibit 20). The purpose of the meeting was to obtain more detailed information about J.D.H. to initiate the transition process of J.D.H. from SLS. Ms. Hudson testified:

...it was very important to J.D.H. and to Ms. H and to the school and to our school system, to the HCS, to develop a plan to transition J.D.H. in a way that would be smooth and allow time for decisions to be made and options would be covered so that we would have ...the team would have all the information needed to develop an IEP to address his needs. (Hudson Tr. pp. 588-589).

Ms. Hudson stated that when the March 2002 meeting was over she was "on a mission" to pull all information together for the next IEP meeting. (Hudson Tr. p. 589). Ms. Hudson was to look at placement options and provide a list of schools to Ms. H and Ms. Card, the principal, at SLS to visit with J.D.H. (Hudson Tr. p. 589-590). Ms. Hudson contacted several private schools and was told that they did not want to enter into a contract with HCS because they did not want to become entangled with federal regulations that went along with federal dollars. Berean Academy was one of

the private schools contacted. (Hudson Tr. pp. 595-596). Ms. Hudson also contacted public schools , all that were in the appropriate school zone and one outside the zone. She wanted to explore the possibility of placement for J.D.H. in the smallest of the public high schools in the zone and the one small high school outside the zone. (Hudson Tr. pp. 595-596).

All of the smaller public high schools contacted either refused to consider placement of J.D.H. in their school or insisted the principal must be involved in the development of an IEP before deciding. (Hudson Tr. pp. 596). Ultimately Ms. Hudson determined she really didn't have a list of places for the parents, J.D.H. and Ms. Card to visit but she did not contact them until July. (Hudson Tr. pp. 597). By the end of July 2002, Ms. Hudson was out of options and needed the recommendations of the IEP team for placement for J.D.H. for the following school year. She stated "...and we were getting – running out of time as far as having an IEP for J.D.H. to start the school year." (Hudson Tr. p. 598)

Notices for the meeting were sent out July 26, 2002 for an IEP Team meeting scheduled for August 1, 2002. (Abernathy Tr. p. 393; Hudson Tr. p. 686). Although Ms. Card and Ms. Hansard, former teachers for J.D.H. and Dr. Bill McGee, the psychiatrist who evaluated J.D.H. were invited to attend, they were not in attendance. Perhaps due to short notice. (Hudson Tr. pp. 599 - 600).

Ms. H. And J.D.H. attended the August 1, 2002 IEP meeting with placement as their primary concern. (Hudson Tr. pp. 601-602). Ms. Hudson testified that placement, location, and building are often confusing terms and that she did not believe that she had clearly explained the differences to Ms. H. (Hudson Tr. p. 605).

The IEP team recommended that the IEP be implemented at Ooltewah High School. (Hudson Tr. pp. 606-607). Ms. Hudson noted that she visited Berean Academy because it was a

small private school that fit the description of the IEP team meeting and that she hoped it might be willing to enter into a contractual agreement with HCS and take students such as J.D.H. but Berean did not want to contract with HCS. (Hudson Tr. p. 629).

Ms. Abernathy, Exceptional Education teacher and Department Chair for Ooltewah High School, testified that Ooltewah was one of the two largest high schools in Hamilton County with approximately 1650 to 1700 students. She testified that in between classes it is very crowded and noisy in the hallways. (Abernathy Tr. pp. 455; 376-377). She testified that in special education at Ooltewah there were approximately 875 students. (Abernathy Tr. p. 377). There are approximately 150-160 students who qualify under the IDEA (Abernathy Tr. p. 386). There may be a maximum of 30-32 students but more likely there are 25 students in each regular education class and 12-13, perhaps more, in special education classes (Abernathy Tr. pp. 384; 454).

The IEP team did not develop class assignments for J.D.H. but Ms. Abernathy stated that it would be very unlikely that J.D.H. would be the only IDEA eligible child in any of his academic courses. He would be in a classroom with both non-disabled and IDEA eligible students. (Abernathy Tr. pp. 387-388).

J.D.H. attend the August 1, 2002 IEP meeting. The parents and J.D.H. expressed concern about the size of the school and the safety of such a large school for J.D.H. who feared being bullied. (Abernathy Tr. pp. 397-399). J.D.H. stated that he did not want to attend Ooltewah High School. (Abernathy Tr. pp. 411; 446). Ms. Abernathy did not observe that J.D.H. was “terrified” at the meeting but admitted ... “I don’t know him that well.” (Abernathy Tr. p. 399). In fact, Ms. Abernathy testified:

Well actually, the first and only involvement I’ve had with J.D.H. was

the IEP meeting that was held at Ooltewah High School in August of ...what was the date? "02".

(Abernathy Tr. p. 391)

"I saw him when he walked in the meeting." That's the first day I knew him." (Abernathy Tr. p. 450).

Safety concerns of the parent and J.D.H. were discussed at the August 1, 2002 meeting. Ms. Abernathy agreed that J.D.H. could not be protected from all bullying...(Abernathy Tr. pp. 426-427).

Ms. Abernathy shared an experience of one special ed student at Ooltewah High School:

"One of our graduates got into trouble with peers at Ooltewah High School. They actually put him in a garbage can because of something he said to them that, just for lack of a better word, pissed them off. So we had to work with him on those (verbal) skills.

(Abernathy Tr. p. 420).

Ms. Abernathy noted further that the size of the building at Ooltewah was "overwhelming" to Ms. H and J.D.H. (Abernathy Tr. p. 447). Further Ms. Abernathy recognized that in a school as large as Ooltewah High School that bullying, teasing, and even violence can and do occur. (Abernathy Tr. p. 164).

Eileen Card's Testimony:

Ms. Card was the principal at SLS during J.D.H.'s last years there. Ms. Card testified that she saw and talked with J.D.H. on a daily basis in a variety of situations at SLS (Card Tr. p. 288). Ms. Card testified that if SLS had continued offering a high school program that she expected that J.D.H. would graduate with a regular education diploma. She stated:

"We could make accommodations for him – because we're so small – we're a very small school – that we could make the accommodations that he needed and he certainly would graduate with a regular education diploma. (Card Tr. p 249).

Ms. Card noted that SLS students often transitioned better to a small school environment and

that she was waiting for a list of schools to visit with J.D.H. and his parents. She testified:

“I didn’t receive a list. I was waiting for a list, because I felt like it was very important for J.D.H. to have me with him. He was – I considered him to still be fragile; and that transition I knew was going to be very difficult for him.

And he said he didn’t want to go to – I think it was Ooltewah he was zoned for —

“And so I felt like he needed to – if he saw me with him, he would be a lot more willing to go and visit. So yes, I wanted to go there. And I know we talked about that, and were making arrangements, but I never did get a list.”

(Card Tr. pp. 252-253)

Ms. Card opined that she would not have been in favor of J.D.H.’s placement at Ooltewah High School. She did not believe he was ready for a typical high school but was ready for one that would meet his needs. (Card Tr. p. 255).

A safe environment was one of my main points, because children – often, children with Asperger’s are teased; J.D.H was extremely sensitive to other children and how they felt about him”

(Card Tr. p. 254)

When asked if her safety concerns about J.D.H. would be relieved if he went “off bell” to transfer from class to class at a large school she stated that that would not be adequate, that J.D.H. needed to be watched and guided. (Card Tr. pp. 255-256).

As previously discussed, the size of the school, the environment, were of primary concern in August of 2002. Ms. Hudson indicated that the building was not the placement whereas, Ms. H. agreed with the IEP except for the placement. (Exhibit 27). Ms. Card testified that generally the program could be considered the placement, but pointed out that if one is going to look at the student’s individual needs, that one must look at the building that the student’s going to be in (Card

Tr p. 337). She stated:

...knowing J.D.H. as I do, I firmly believe that placement -- the physical building was not appropriate, that he couldn't learn in that building simply because of his fears from previously and because of the vastness of that building.

(Card Tr. p. 338)

Ms. Card explained that J.D.H. must transition in steps regarding size of his educational environment. J.D.H. was in a small school at SLS and a little larger school at Berean, then the next step could be a little larger. (Card. Tr. p. 345). She stated that in her professional opinion that knowing J.D.H. at the end of the 2002 school year that she did not believe J.D.H. would have been successful at Ooltewah High School and that he would not have been able to progress as he would in a small school environment. (Card Tr. pp. 345-346) J.D.H.'s ..."environment was critical to his learning..." (Card Tr. p. 347).

Appropriateness of the August 1, 2002 IEP:

Ms. Card testified that in her professional opinion that the August 1, 2002 IEP for J.D.H. was not appropriate. It was missing some elements concerning J.D.H.'s safety. It did not contain complete measurable goals for language, a most important skill for J.D.H. to develop, among other missing elements. (Card Tr. pp. 350-352).

Ms. Card testified:

"I had spent a lot of time with J.D.H. I got to know him."

(Card Tr. pp. 346-347).

Ms. Abernathy testified that in her opinion the 8/1/02 IEP was appropriate for J.D.H. (Abernathy Tr. pp. 432-433). She noted, however, that 9 weeks into the school year an IEP Team

meeting could be reconvened to review the progress of the student and determine if any changes needed to be made in the IEP. (Abernathy Tr. p. 433). She admitted she knew little about J.D.H. prior to the meeting as she had not reviewed documents and thus had no preconceived ideas about J.D.H. (Abernathy Tr. p. 472).

Ms. Hudson testified that in her opinion the August 1, 2002 IEP would have offered J.D.H. FAPE. She qualified her opinion somewhat stating that the IEP would have offered J.D.H. “An entry point” and could be modified some time later in the school year. (Hudson Tr. pp. 607-608). Ms. Hudson noted that the language goal was a “red flag” and agreed with Ms. Card’s evaluation of the language area of the IEP and that it was inadequate because the objectives were vague. Ms. Hudson indicated that an additional IEP meeting would be required to determine a more measurable language goal for J.D.H. In describing the 8/1/02 language portion of the IEP she stated: ...“you know, when you look at quality, that wasn’t high quality.” (Hudson Tr. p. 689).

Conclusions of Law:

Congress intended for the IDEA (20 U.S.C.A. 1400 et seq.) to guaranty children with disabilities a free appropriate public education, FAPE. Renner v. Board of Ed. 185 F. 3d 635 (6th Cir. 1999). Prevailing case law requires a determination of whether HCS complied with the IDEA in two respects: (1) Compliance with statutory procedures, and (2) whether the challenged IEP was “reasonably calculated to enable the child to receive educational benefits.” Board of Education of Hendrick Hudson Central School Dist. V. Rowley, 458 U.S. 176 (1982) ex rel Mrs. C. V. Knox County Schools, 315 F. 3d 688, 693 (6th Cir. 2003). Having assured itself that the process met the requirements of IDEA, a reviewing Court or Hearing Officer must then determine whether the IEP developed by the school system in accordance with the mandated procedures is reasonably calculated

to enable the child to receive educational benefits. There is no violation of the IDEA if the school system has satisfied both requirements. Rowley 458 U.S. 206-207.

The instant case involves the parents' request for reimbursement for private placement and for transportation. In order for a parent to unilaterally alter the child's placement or program and be entitled to relief under the IDEA, the parents must establish that the public placement or services offered by the school district violated IDEA and that the private placement or service was proper under the act. Florence Co. School Dist. Four v. Carter, 510 U.S. 114, 114 S. Ct. 361, 126 L. Ed. 2d 284 (1993); Wise v. Ohio Dept. of Ed., 80 F. 3d 177, 184 (6th Cir. 1996).

Although the IDEA does not require a local education agency to pay for unilateral private school placement, the Act does provide for reimbursement if "the agency has not made a full appropriate public education available to the child in a timely manner prior to enrollment" 20 U.S.C.A. §1412 (10) (c) (ii) 34 C.F.R. §300.403(c)

J.D.H. and Ms. Hudson attended the IEP meeting in March 2002. Neither the parents nor J.D.H. wanted J.D.H. to attend Ooltewah High School. J.D.H.'s home school and where his two siblings attended. (Exhibit 27). Ms. H. and Ms. Card, SLS school principal and J.D.H. expected, based on the March 2002 meeting, that they would be given a list of schools, both private and public to visit. (Hudson Tr. pp. 588-592). They did not receive a list and no visits to schools were made before the beginning of the 2002-2003 school year. (Card Tr. pp. 252-253).

In late July, 2002, Ms. H was contacted by HCS for a requested IEP Team meeting. It was agreed that an IEP Team meeting would be held 8/1/02 and Ms. Hudson waived the 10 day notice. (Hudson Tr. pp. 686-687).

J.D.H. attended the IEP Team meeting with Ms. Hudson. Both signed the IEP form but

indicated that they did not agree with the placement meaning that they did not agree that the IEP should be implemented at Ooltewah High School. (Hudson Tr. pp. 601-607; Exhibit 27). Ooltewah High School was the only school J.D.H. was offered. (Hudson Tr. pp. 597-598).

It has been argued that since J.D.H. was not enrolled in the HCS system, he would not be eligible for reimbursement. That argument will not lie for the 2002-2003 school year. Both HCS and the parents participated in the IEP Team meetings throughout the 2001-2002 school year. The development and implementation of the IEP are “cornerstones” of the IDEA. Tennessee Dept. Of Mental Health v. Paul B., 88 F. 3d 1466, 1471 (6th Cir. 1996). The purpose of the development of the IEP is to provide the student FAPE, a free appropriate public education. Pennsylvania Association for Retarded Children v. Commonwealth, 334 F. Supp. 125 F. (PA 1971).

The use of the word “appropriate” in the language of the Act, although by no means definitive, suggests that Congress used the word as much to describe the environmental settings in which handicapped children should be educated as to prescribe the substantive content or supportive services of their education.

The Act’s use of the word “**appropriate**” thus seems to reflect congress’ recognition that some settings simply are not “suitable environments for the participation of some handicapped children”

Board of Education of Hendrick Hudson Central School District v. Rowley, 485 U.S. 176, 102 S. Ct. 3034 (1982).

The proof amply supports the need for J.D.H. to be placed in a small, safe, supportive environment with small classes and with modifications, e.g., the amount of time J.D.H. is given and the manner of explanation given. J.D.H. Tr. p. 98; Bryant Tr. p. 347; Card Tr. pp. 252-254; McGee

Exhibits 5 & 6) without fail, educators, medical providers and psychologists who worked with and knew J.D.H. emphasized the need for an individual with Asperger's Syndrome to be in a safe, secure, quiet environment to learn, grow and prosper. Bryant Tr. pp. 14-15; 23).

There was testimony contrasting placement with the school building. (Hudson Tr. p. 605; McGee Exhibits 5 & 6).

Interestingly, HCS quotes a 4th Circuit case in which the Court stated in its opinion:

“The touch stone of the term ‘educational placement’ is not the location to which the student is assigned but rather the educational environment in which educational services are provide.” White v. Ascension Parrish School Board, 204 U.S. App. LEXIS 12701§21 (4th Cir. 2004).

The Court in White found that the instructional settings of the student's original school and the school to which he was transferred were “materially identical” and thus found no violation of the stay put provision

In the instant case no one testified that Berean Academy and Ooltewah High School were “materially identical” significantly all who testified agreed Ooltewah was a large student body in a large building with 1700-1800 students. In fact, Ooltewah High School was “materially different” from Berean Academy and from the kind of environment recommended for J.D.H. (Card Tr. p. 337).

The failure of HCS to offer an appropriate environment, for whatever reason, denied J.D.H. FAPE for the 2002-2003 school year. The parents took a financial risk when they placed J.D.H. in Berean Academy. However, the parents had no option but to place J.D.H. in a small private school environment as recommended by educators, medical and psychological experts who knew him best.

Although the argument has been made that the school offered placement at the 8/1/02 IEP Team meeting between Ms. Hudson, J.D.H. and school personnel, Ooltewah High School was not an

“environment” that had been selected to meet the unique needs of J.D.H. but appeared to be the only place HCS had to offer. (Hudson Tr. p. 598).

Further, J.D.H. has prospered at Berean Academy since he has been enrolled there and has received educational benefit there. (J.D.H. Tr. pp. 98-99; Hudson Tr. pp. 565-566; Bryant Tr. p. 15).

Thus, since HCS did not make a full appropriate public education available to J.D.H. in a timely manner prior to enrollment, the parents are entitled for reimbursement for tuition for Berean Academy for the 2002-2003 school year.

No proof was presented concerning the issue of transportation for the 2002-2003 school year and thus it must be denied.

The parents have also requested retroactive reimbursement for the school year 2003-2004 placement at Berean Academy.

HCS by letter of July 22, 2003 offered to convene an IEP Team meeting to address the parents concerns, J.D.H.'s strengths and needs in order to determine if further assessments were needed to develop an IEP for the 2003-2004 school year and offer FAPE. (Exhibit 64).

On 8/25/03 Ms. Hudson filed an Administrative Complaint with the Tennessee Department of Education outlining 8 points of concerns with a requests for reimbursement. Thereafter a number of letters passed between the Department of Education, HCS and the parents. However, the parents did not respond to HCS concerning an IEP Team meeting as suggested by the 7/22/03 letter of Pamela Hudson. (Exhibits 64; 53,54, 55, 56,57). Throughout the exchange of letters, the parents were advised that the appropriate venue to resolve the dispute was a Due Process Hearing. (Exhibits 54, 56). Additionally, per instruction of Joe Fisher, Assistant Commissioner of Special Education, HCS, by letter by Ms. Hudson dated 12/2/03 offer to convene another IEP Team meeting. (Exhibits

56, 57). The parents did not respond to either offer of an IEP meeting until the request for a Due Process Hearing was filed 4/21/04. (Exhibit 11).

There was no proof offered that the school system failed to follow the procedural guidelines of the IDEA. The 2003-2004 reimbursement request is denied as IEP meetings could have been held to address J.D.H.'s specific needs prior to the beginning of the 2003-2004 school year.

No evidence was presented concerning the request for reimbursement for transportation for 2002-2003. Thus the request is denied.

Prospective Reimbursement for Placement at Berean Academy for 2004-2005

The parents and J.D.H. have requested prospective reimbursement for placement at Berean Academy for the 2004-2005 school year. The Due Process Hearing occurred June 22 & 23, 2004, prior to the beginning of school. It is thus the opinion of this Hearing Officer that the issue was not ripe for this forum. At the time of the request and the Hearing, it was not certain where J.D.H. would attend school nor what his unique needs would be. Therefore, prospective reimbursement shall not be granted for 2004-2005 tuition for placement at Berean Academy.

ORDERED, ADJUDGED, AND DECREED that:

1. The parents shall be reimbursed from the monies expended for tuition at Berean Academy for the 2002-2003 school year. The parents shall provide specific billing for Berean Academy for the tuition for the 2002-2003 school year within fifteen (15) business days of the date of this Order. Reimbursement shall be provided within twenty (20) days of presentation of the required documentation.
2. No proof was presented concerning the requests for transportation costs, therefore, transportation costs are denied.

3. The Petitioner is the prevailing party.
4. The 2003-2004 reimbursement request is denied
5. The prospective tuition reimbursement for the 2004-2005 school year is denied.

IT IS SO ORDERED this _____ day of November, 2004.

Patty K. Wheeler, Administrative Law Judge

CERTIFICATE OF SERVICE

This is to certify that I, Patty K. Wheeler, the undersigned, served a true and exact copy of this legal pleading to D. and J. H., parents for J.D.H. at XXXXXX, Ooltewah, Tennessee 37363 and Gary D. Lander, Attorney for the Hamilton County Schools, at Chambliss, Bahner & Stophel, P.C., Two Union Square, 1000 Tallan Building, Chattanooga, Tennessee 37402, by deposit in the United States mail, postage prepaid and correct address thereon to carry the same to its destination. This the _____ day of November, 2004.

Patty K. Wheeler, Administrative Law Judge

“Any party aggrieved by this decision may appeal to the Chancery Court in the county in which Petitioner lives, or may seek review in the United States District Court for the District in which the School System is located. Such appeal or review must be sought within sixty (60) days of the date of the entry of a Final Order in non-reimbursement cases or three (3) years in cases involving education costs and expenses. In appropriate cases, the reviewing Court may order that this Final Order be stayed pending further hearing in the cause.

If a determination of a hearing officer is not fully complied with or implemented, the aggrieved party may enforce it by a proceeding in the Chancery or Circuit Court, under provisions of §49-10-601 of the Tennessee Code Annotated.

Within sixty (60) days from the date of this order (or thirty (30) days if the Board of education chooses not to appeal), the local education agency shall render in writing to the District Team Leader and the Office of Compliance, Division of Special Education, a statement of compliance with the provisions of this order.”